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Reviews

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W M Gloag and R C Henderson, THE LAW OF SCOTLAND, 12th edn by Lord Coulsfield and Hector L MacQueen (general editors)

Edinburgh: W Green & Son Ltd (www.wgreen.co.uk), 2007. ccxcix+1344pp. ISBN 9780414015913. £185.

“With excess of modesty the authors of this work entitle it an ‘introduction’ and refer to it in their preface as a book for students. We regard it rather as a valuable and original contribution to the literature of Scots law . . . [It will be] a favourite book for consultation to many practising lawyers.” The book which was the subject of this anonymous review, published at 1927 SLT (News) 223, was called *Introduction to the Law of Scotland*, by the Regius Professor of Law at Glasgow and the Professor of Scots Law at Edinburgh: the excess of modesty did not vanish until the 10th edition (1995) since when it has been *The Law of Scotland*. In 1927 the price was 42/-. At xliii + 623 pages it was shorter than the current edition, which runs to ccxcix+1344 pages, but nevertheless the latter’s price tag of £185 is disappointing. The first edition was aimed at students and was affordable by them. Few students will buy the new edition.

The anonymous reviewer saw at once that, though a student book, it was more than a student book. Time has confirmed that judgment. A search of cases reported in the *Scots Law Times* brings up well over a hundred hits. The respect—one might even say reverence—with which Gloag & Henderson (as everyone calls it) is regarded goes all the way up to the House of Lords: see *Barclay’s Trs v Inland Revenue* 1975 SC (HL) 1. It is and has long been a sort of benchmark of orthodoxy, not surprising given the contributors over the past eighty years: leading academics, leading judges and leading practitioners. And its comprehensiveness is extraordinary. This reviewer has occasionally joined in an anoraky game of “I bet you it’s not in Gloag & Henderson” in which one player mentions a rule of law of such obscurity that its inclusion in a one-volume work seems hardly credible. Usually the rule is there. But it should be mentioned that the coverage is limited to private law, plus some introductory material. The earlier editions did have a final chapter about criminal law, but that was dropped in the 10th edition and has not reappeared. Private law is, however, taken fairly broadly, bringing in much commercial and corporate law. For example there are nearly 70 pages on company law. The aim of Gloag & Henderson was always to cover a large chunk of the LLB curriculum, and it continues to do so.

Gloag & Henderson is remarkable in being a student text that has achieved authoritative status. That is the more remarkable in that it is not limited to a particular field, such as contract, say, but is an overview text. Yet this is not the first time that this has happened. In Scotland it is the fourth. The three previous student overview books that achieved authoritative status were Mackenzie’s *Institutions of the Law of Scotland* (1684), Erskine’s *Principles of the Law of Scotland* (1754), and Bell’s *Principles of the Law of Scotland* (1829). It is a striking story, and this reviewer is unsure to what extent it is a peculiarly Scottish one. In the Roman Empire it happened once, with the *Institutiones* of Gaius, of which the *Institutiones* of Justinian can be regarded as a new edition. In England it arguably happened once: Blackstone’s *Commentaries* (1765-1770), though that was so large that it was perhaps more than an overview text and it was not aimed only at students.

Since 1927 Gloag & Henderson has doubled in size. But the number of chapters has been fairly constant: it was 48 in 1927 and the highest it reached was only 54 (10th and 11th editions); it is now down to 50. Nor has the coverage altered much. But there have been interesting changes to the structure. The first edition consists of 48 individual chapters, without any groupings. There is an indistinct progression from contract (most of the first 31 chapters) to delict (chapters 32 and 33) to property (chapters 34 to 38), to succession and trusts (chapters 39 to 43) and then miscellaneous topics. But few students could have discerned any sort of order. Nor is there an introductory chapter to provide the student with a map. This lack of interest in systematics marks Gloag & Henderson off from the three predecessors mentioned above. Matters continued thus up to and including the 9th edition (1987). Change begins with the 10th in 1995. In that, the chapters are in nine groups: (1) Introductory; (2) Contract; (3) Particular Contracts; (4) Unjustified Enrichment and Salvage; (5) Delict; (6) Property; (7) Succession; (8) Persons; (9) Diligence and Insolvency. In the 11th edition (2001) there are some modifications to that scheme. In the new edition one begins to see *Ordnungsliebe*: there are parts, divided into sections, subdivided into chapters. Part (1) is The Legal System. Part (2) is Obligations divided into four sections, (i) Contract, (ii) Particular Contracts, (iii) Unjustified Enrichment and *Negotiorum Gestio* and (iv) Delict. As this part begins with two chapters giving a general introduction to the law of obligations, in substance Obligations has five sections rather than four. Part (3) is Property, consisting of four sections, (i) Real Rights, (ii) Transmission of Property on Death, (iii) Trusts and (iv) Judicial Factors and Similar Appointments. Part (4) is Persons. This part, though covering both natural and juristic persons, is not subdivided into sections. Part (5) is Debt Enforcement and Insolvency and is also not subdivided.

Although this new interest in systematics began with the 10th edition, the change was most marked in the 11th. In all the editions up to and including the 10th, the first chapter was "Statute and Common Law". In the 11th that chapter (renamed "Sources of Law") was preceded by a new chapter, "Structure of Scots Private Law", which, at para 1.01, explained that "the essential characteristic of a civilian-based system is that it has a distinct structure founded upon principle". The first two chapters of the 11th edition are in the 12th merged into a single chapter, "Structure and Sources of Scots Law". The sentence just quoted seems to have vanished. But the emphasis on structure in this first chapter is just as strong, and indeed the word "taxonomy", which this reviewer has not found in the 11th edition, let alone earlier ones, makes a bold appearance in the heading of para 1.02 of the latest edition. There are those who think that the word "taxonomy" is the freemason-handshake of the neo-Civilians. If that is right, the dropping of the expression "civilian-based" is less significant than might appear. The now-omitted sentence is certainly an interesting one. It is commonly said that an interest in systematics is one of those features that distinguish the Civilian tradition from the Common Law tradition. And it is commonly said that Scots law is a mixture of those traditions. If so, one would expect to see more interest in systematics in Scots law than in England, and less interest than in, say, France or Germany. This reviewer would suggest that that is what one does see. It is also commonly said that from about the middle of the nineteenth century to the middle (or later) of the twentieth, Scots private law moved closer to the Common Law tradition, and there are some who say that in the later twentieth century it started to move again in the Civilian direction. That picture may be right or wrong but it gains some support from a study of the four works mentioned, including the history of successive editions of Gloag & Henderson. (That is not to say that the arrangement – taxonomy? – of the new edition is an unarguably Civilian one. In any case, Civilian arrangements vary, and every arrangement has its difficulties.) Lastly on this topic, there is the curious question of the influence of Gloag & Henderson on *English Private Law*, an influence that might possibly be reciprocal, because the first edition of that remarkable work, edited by Peter Birks, appeared in 2000, in other words before the publication of the 11th edition of Gloag & Henderson (and indeed is mentioned by

Professor MacQueen in the preface to the 11th edition). The reviewer will at this point do no more than refer to Eric Descheemaeker's valuable study, "Mapping the Common Law: on a recent English attempt and its links with Scottish jurisprudence" 2003 JR 295.

Despite so many editions, much of the original text of 1927 survives, testimony to its quality. That any errors in such text could survive intergenerational scrutiny seems hardly possible, but this reviewer crows in triumph to find one. "Payment to a person honestly and reasonably believed to be the creditor is good, as, for instance, payment to the original creditor after he has assigned the debt but before intimation has been made" we read at p 22 of the first edition, and again at p 97 (paragraph 3.30) of the 12th. The rule is sound but the example is not an example. If there is an unintimated assignation, and the debtor pays the original creditor, the reason he is discharged is not because he has paid the wrong person in good faith, but because he has paid the right person.

Finally, a quibble. Private lawyers are familiar with *Gatty v Maclaine*. But *Gatty v Maclaine* is no more. In its place is the uncouth *Maclaine v Gatty*. In the *Appeal Cases* the name of the case was given thus on the basis that in reports of English cases the appellant's name comes first. But it is not an English case, and the Scottish rule is that the pursuer's name comes first. The new edition of Gloag & Henderson has replaced the accurate SC citation of the previous eleven editions with the inaccurate AC citation. One hopes that the 13th edition will undo the error.

A new edition of Gloag & Henderson is always an occasion. The general editors, Lord Coulsfield and Professor MacQueen, the assistant editors, David Cabrelli and Professor Carey Miller, and the associate editors, Douglas Bain, Laura Dunlop, W C H Irvine, Nicholas Grier, David Irvine, Catherine Ng, David Nichols, Roderick Paisley and Morag Wise, worthy successors to a long and distinguished roll of honour, may congratulate themselves on a splendid achievement.

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Fiona Leverick, KILLING IN SELF-DEFENCE

Oxford: Oxford University Press (www.oup.co.uk), 2007. xxviii+217 pp. ISBN 9780199283460. £50.

This book, which is published in the series of *Oxford Monographs on Criminal Law and Justice*, is an expansion of the author's PhD thesis and also of the chapter on self-defence which she wrote in James Chalmers and Fiona Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006; reviewed at (2007) 11 EdinLR 284). It deals with the philosophical basis for the plea of self-defence in homicide and with the practical problems of applying the defence in the light of that basis. This task is accomplished with the same analytical skills and wide citation of authorities from (mainly) the United Kingdom, USA, Canada and Australia as Dr Leverick displayed in the earlier work. The book is concerned, as any discussion of the theoretical basis of self-defence must be, with the case of intentional killing in self-defence, but one has to recognise, as does the author, that most cases of self-defence are not cases of intentional killing, but revolve around the question whether the force which resulted in death was proportional to the force offered by the aggressor, which again will often not be force intended to kill.

The book begins with a brief discussion of the difference between self-defence and the defences of necessity and duress, and an acceptance that it is difficult to distinguish either of those from necessity in borderline cases. The author suggests distinguishing between the two